# In the Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 88.

*THE CLEVELAND TRUST COMPANY,*

PLAINTIFF IN ERROR,

*vs.*

*M. A. LANDER, Treasurer of Cuyahoga County.*

## Brief for Defendant in Error.

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# In the Supreme Court of the United States.

THE CLEVELAND TRUST COMPANY,

PLAINTIFF IN ERROR,

*vs.*

M. A. LANDER, TREASURER OF CUYAHOGA COUNTY,

DEFENDANT IN ERROR.

## Statement of the Case.

An act of the Auditor of Cuyahoga County is the wrong for which the plaintiff, in its petition, seeks a remedy.

The Auditor fixed the value of the shares of stock of the plaintiff at their true value in money, as he was required to do by Section 2766, R. S. of Ohio. In fixing that value he included and took into account, among other things, the value of certain non-taxable United States bonds owned by the plaintiff, and this is the act which the plaintiff alleges to be wrongful and unlawful.

In the petition occur these words, "Wherefore, the "plaintiff submits that said Auditor of Cuyahoga County "had no authority or power to include said U. S. bonds at a "valuation of ..... any ..... sum, in fixing "the valuation of the shares of this plaintiff."

It thus appears that the real question raised upon the record in this case is whether, in fixing the value of shares of stock of an incorporated bank, under Section 2766, R. S. of Ohio, the County Auditor has a right to include, and to take account of the value of non-taxable United States bonds owned by the corporation.

Counsel for plaintiff have, with much ingenuity, raised and discussed a very different question. Plaintiff's counsel affirm, first, that the system of legislation found in Sections 2762 to 2769, R. S. of Ohio, both inclusive, provides a plan for taxing, not the shares of stock in an incorporated bank, but for taxing the property of the corporation itself, and second, that in estimating the value of the property of the corporation for taxation, non-taxable United States bonds belonging to the corporation are not to be included.

# Argument.

The second of the above propositions, we deem it unnecessary to discuss, for we deny that the record raises any such question. The *petition* says that in valuing the *shares* of stock in the plaintiff bank, the Auditor ought not to have included the value of the non-taxable United States bonds owned by the plaintiff corporation.

Counsel for plaintiff, in *argument*, affirm that in valuing the *property of the corporation* the Auditor ought not to include the non-taxable United States bonds belonging to the corporation.

It is obvious, therefore, that counsel have discussed a proposition which does not arise upon the record in this case. Indeed, the *petition avers* that the Auditor was engaged in fixing the value of *shares of stock* when he did the unlawful act complained of, while counsel in their *argument* claim that the Auditor was not engaged in fixing the value upon shares of stock, when he committed the error complained of, but was engaged in fixing the value of the *property belonging to the corporation itself*.

There is, therefore, clearly an *incongruity between the allegations* made in the petition, and the line of *argument* pursued by plaintiff's counsel.

It is well settled that a State may tax the shares of stock in an incorporated bank at their full value, notwithstanding the capital of the bank is partially or wholly invested in non-taxable United States bonds.

> "The act of June 3, 1864, 'To provide a "national currency,' etc., rightly construed, sub-"jects the shares of the banking associations au-".horized by it, and in the hands of shareholders, to taxation by the States under certain "limitations (set forth in its 41st section) without regard to the fact that a part or the whole "of the capital of such association is invested in "national securities declared by the statutes authorizing them to be 'exempt from taxation "by or under State authority.'"
>
> Van Allen vs. The Assessors, 3 Wallace, 573.

> "Shares in banks, whether *State Banks* or "those organized under the act of June 3d, 1864, "are liable to taxation by the State under certain "limitations (set forth in Section 41 of the act), "without regard to the fact that the capital of "such banks is invested in bonds of the United "States, declared, by statutes creating them, to "be exempt from taxation by or under State au-"thority."
>
> People vs. The Commissioners, 4 Wallace, 244.

> "The shares in national banks thus to be "taxed, are to be understood as the individual "property, or *choses* of the stockholders, as con-

> " tradistinguished from aliquot parts of the capi-
> " tal and property of the bank, and as such, may
> " be taxed at their full value, without deduction
> " for the franchise, for real estate otherwise
> " taxed, or for untaxable bonds owned by the
> " bank."
>
> Frazier et al. vs. Seibern et al., 16 O. S., 614.

But plaintiff's counsel claim that we are not, in reality, dealing with the question of the taxation of the *shares of stock* of the corporation, but with the question of the taxation of the *property of the corporation itself*, and that, therefore, the authorities above cited have no application to the case at bar.

While we deny that the record raises any question, whatever, in respect to the taxation of the *property of the corporation itself*, we will pay sufficient respect to our opponent's claim to give it an examination. The question, then, for the present is, does the legislation found in Sections 2762 to 2769, R. S. of Ohio, and related sections, constitute a scheme for the taxation of the *property belonging to incorporated banks*, or for the taxation of the *shares* of stock in such corporation.

Plaintiff's counsel say that the constitution of the State of Ohio specifically requires that the property of corporations, and especially of banking institutions, *shall* be taxed, and cites Section 4 of Article 13, and Section 3 of Article 12, of the constitution, which provides that the prop-

erty of corporations shall be subject to taxation the same as the property of individuals, and that the General Assembly shall provide by law for taxing the property of banks and bankers, so that all property engaged in banking shall bear a burden of taxation equal to that imposed upon the property of individuals.

It may be remarked that those provisions of the constitution are not self-executing, and that they enter into our scheme of taxation only to the extent that legislation has been enacted to carry them into effect.

No Ohio case has been cited which even hints that those provisions of the constitution in, and of themselves, impose any tax, whatever, upon any corporation, bank or banker. In order, therefore, to determine whether the *property of banking corporations*, rather than the *shares* of stock in such corporations, is made the subject of taxation, we must look to see what the legislature has said and done upon this subject.

Counsel for plaintiff in error say that the history of the legislative enactments upon this subject shows, clearly, that the General Assembly has obeyed the mandate of the constitution, and has enacted laws for taxing all *property of State banking institutions*. To support this proposition, counsel cite

50 O. L., 135, Section 19,

and

58 O. L., 59.

The legislation found in those volumes, it is claimed, shows that at the time it was enacted and in force, it was the legislative policy of the State to tax the *property of banking corporations*, rather than the *shares* of stock in those corporations.

We do not deem it needful to controvert that proposition, but what we do claim is that, even if such were conceded to have been the policy of the State during that period of time, the State changed its policy by enacting, on the 16th day of April, 1867, 64 O. L., 204, the act entitled "An act "to provide for the taxation of bank shares and bankers." The scheme of taxation contained in that act was essentially the same as that found in Sections 2762 to 2769 R. S., both inclusive.

Plaintiff's counsel well say, in respect to this change, "This law * * * was evidently the result of a decis- "ion of the United States court regarding the taxation of "*shares* of national banks."

In

Owensboro National Bank vs. Owensboro, 173 U. S., 674,

on page 679, the Court, referring to the decision in Van Allen vs. The Assessors, 3 Wall., 573, and to the tax there imposed, said:

> "It (the tax) was in that case attempted to "be sustained on the same ground relied on here,

> "that the tax on the *capital* was equivalent to
> "the tax on the *shares*, as respected the share-
> "holders. But the position was answered that,
> "admitting it to be so, yet, inasmuch as the
> "*capital* of the *State* banks may consist of the
> "*bonds of the United States*, which were *ex-*
> "*empt* from *State taxation*, it was not easy to
> "see that the *tax* on the *capital* was equivalent to
> "a tax on the *shares*."

Inasmuch, therefore, as the Supreme Court of the United States has held that the imposing of a tax upon the *property* owned by a *State* bank was not the legal equivalent of a tax imposed upon the *shares* of stock in a *national* bank, and inasmuch as the State of Ohio desired to bring itself within the permission of Congress, to tax *shares* of *national* banks, the State *changed* its system of taxing its own banks; that is, in such case, it taxed, not the *property of the corporation*, but the *shares* of stock in the corporation.

This history, therefore, of the *reason* for the *change* in the State's system of taxation, furnishes a most complete revelation of the true purpose and *character* of that change.

The change proceeded upon, and grew out of the theory that a tax on the *property belonging to a bank*, is not, necessarily, the legal or actual equivalent of a tax on the *shares* of stock in the corporation. It had been held that under a system of taxing *shares* of stock, the value of non-taxable United States bonds owned by the corporation, could not be deducted in fixing the value of the *shares*, but the val-

ue of non-taxable United States bonds could, and must be deducted, under a system of taxation of the *property of the corporation*. This history, therefore, shows that the change made in the Ohio system of taxation relating to incorporated banks, was a cutting loose from taxation of the *property of a corporation*, and was the adoption of another and a different system altogether, to-wit: the taxation of a species of property which was not necessarily the legal or actual equivalent of the property of the corporation, but which had been decided by the Supreme Court of the United States to be not the equivalent for taxation, of the property of the corporation.

The Supreme Court of the United States, prior to the passage of the act of April 16th, 1867, (64 O. L. 204), had said, practically, that a State might tax shares in national banks, provided it also taxed *shares* in incorporated *State* banks. This holding of the Supreme Court of the United States was equivalent to saying to the States that, *unless* they did tax *shares* of stock in their incorporated banks, they would not be permitted to tax *shares* in *national* banks. Ohio desired to tax *shares* in *national* banks. I order to do this she was compelled to tax *shares* in her incorporated *State* banks. This, as plaintiff's counsel well say, had not been done in Ohio prior to 1867. If, therefore, Ohio desired to tax *shares* of stock in *national* banks, she was compelled to *change* her system of taxation relating to incorporated *State*

banks, and to place the tax, not upon the *property belonging to the incorporated bank*, but upon the shares of stock in such bank. This is precisely what the State undertook to do by by the act of April 16th, 1867 (64 O. L., 204).

One of the very strong reasons given by the Supreme Court of the United States for requiring States to tax *shares* of stock in *State* banks rather than the *property belonging to such banks*, was the fact that a large part, or possibly the whole, of the *property of a State* bank might be invested in *non-taxable United States bonds*, as is the case with the present plaintiff in error, and thus the *property of the incorporated bank* would largely, if not entirely, escape taxation, while *shares* of stock in *national* banks would be taxed at their full value, without any deduction of the value of non-taxable United States bonds, which the *national bank* might hold. This would create a *discrimination* against national banks, which the law of Congress would not tolerate.

*The Bank Tax Case*, 2 Wallace, 200, was decided at the December term, 1864; *Van Allen vs. The Assessors*, 3 Wallace, 573, was decided at the December term, 1865, and *People vs. Commissioners*, 4 Wallace, 244, was decided at the December term, 1866; *Frazier et al. vs. Seibern et al.*, 16 O. S., 614, was decided February, 1866. These decisions, therefore, immediately preceded and brought about the passage of the Ohio act of April 16th, 1867 (64 O. L., 204).

In *Van Allen vs. The Assessors*, 3 Wallace, 573, syllabus 3, mention is made of the fact that the New York stat-

ute, then under consideration, did not tax *shares* of stock in its *State* banks, but taxed the *property belonging* to the *banks*. This, of course, is precisely what the Ohio law did prior to 1867.

In view of the above recited history of the decisions of the United States and Ohio Supreme Courts, and of the legislation of Ohio, it seems strange that plaintiff's counsel, with such history in mind, should claim that the Ohio statutes, now under consideration, provide for the taxation, not of *shares* of stock in incorporated State banks, but for the taxation of the *property belonging to such corporation*.

A mere inspection of the present legislation, and of that in the annual volumes from which the present sections were taken, reveals, most clearly, that the principal subject matter of the legislation was *shares* of stock, and *holders* of such stock. The act of April 16th, 1867, 64 O. L., 204, is entitled, "An act to provide for the taxation of bank *shares* "and bankers." It will be observed that no mention here is made of *banks*. In 73 O. L., 251, is an act entitled, "An act "to provide for the equalization of the value of bank *shares* "for taxation." In 74 O. L., 88, is an act entitled, "An act "to provide for the equalization of the valuation of bank "*shares* for taxation, and to repeal an act therein named."

Out of these acts grew Sections 2808, 2809 and 2810, R. S. of Ohio, establishing a board "for the equalization of

"the *shares* of incorporated banks," whose duty it is to "*ex-*
"amine * * * the value of said *shares* as fixed by the
"County Auditor." (Section 2808, R. S. of Ohio).

It is further made the duty of that board to "hear "complaints and equalize the value of said *shares*," and to "increase or diminish the value of said *shares* by such a per "cent. as will equalize said *shares* to their true value in "money; provided, that said board shall not increase or re-"duce the grand aggregate value of bank *shares* as returned "by the several County Auditors by more than twenty per "centum." (2809, R. S. of Ohio).

"The Auditor of State shall forthwith, after such "equalization shall have been made, certify to the Auditors "of the proper counties, the valuation, as equalized, of the "*shares* of banks. * * * " (2810, R. S. of Ohio).

It is obvious that this Board of Equalization has to do with *shares* of stock in incorporated banks, rather than with the property of the banks themselves.

Section 2762, R. S. of Ohio, provides:

"All the *shares* of the stockholders in any incorpo-"rated bank * * * shall be listed at their true value in "money. * * * "

Section 2764 provides:

"There shall * * * be kept * * * a full "and correct list of the names and residences of the *stock-*"*holders* * * * and the number of *shares* held by

"each, which shall be * * * open to the inspection of "all officers who are or may be authorized to list or assess "the value of such *shares* for taxation."

Section 2765 provides:

"The cashier of each incorporated bank shall make "out and return to the Auditor of the county * * * a "full statement of the names and residences of the *stock-* "*holders* therein, with the number of *shares* held by each, "and the par value of each *share*."

Section 2766 provides:

"Upon receiving such report, the County Auditor "shall fix the total value of the *shares* of such banks, accord- "ing to their value in money * * * and * * * "transmit to the annual State board * * * a copy of "the report so made by the cashier, together with the valu- "ation of such *shares* as fixed by the Auditor."

Section 2839 provides:

"Any taxes assessed on any *shares* of stock or the "value thereof, or any bank or banking association, shall be "and remain a lien upon such *shares* * * * until such "taxes are paid; and in case of the non-payment of such tax- "es * * * it shall be unlawful for the cashier * * "* to transfer, or permit to be transferred, the whole or "any portion of said *stock*, until the delinquent taxes there- "on * * * shall be paid in full; and no dividend shall

"be paid on any *stock* so delinquent, so long as such taxes
" * * * remain due and unpaid."

Section 2840 permits the bank to pay taxes on the *shares*, and deduct the same from dividends.

These quotations from the statute make it obvious that the legislature was dealing with *shares of stock*, and with *shareholders*, and not with the property of the corporation.

Under Section 2762, shares of stock in an incorporated Ohio bank are to be listed and taxed where the bank is located, and not necessarily where the owners of the shares reside. Plaintiff's counsel draw from this the inference that it is the *corporation's property*, and not the shares of stock, that is being taxed, because, they say, the *situs* of the shares of stock is at the place of residence of the owners of those shares. Generally speaking that is true, but the Ohio Supreme Court held that the *situs* of intangible property is a matter wholly within the control of the legislature; and in

Hubbard, Treas., vs. Brush, 61 O. S., 252, in syllabus 2,

that Court said:

"Choses in action, whether book accounts,
"promissory notes, or the like, of *foreign* corpo-
"rations that are kept in this State and arise out
"of the corporate business transacted here, are

> " subject to taxation under the provisions of
> " Section 2744, Revised Statutes."

Furthermore, taxation of shares of stock in an incorporated bank being in *lieu* of taxation of the property of the bank, it is highly proper that the shares should be taxed where the bank itself is located.

After quoting Section 2763, relating to the real estate of a bank, and, doubtless, also, having in mind Section 2766, which requires the Auditor to deduct from the aggregate resources the value of the real estate in estimating the value of the shares of stock, plaintiff's counsel inquire " why " should a deduction of the assessed value of the real estate " be allowed, if it were intended to assess the stock instead " of the property of the corporation?"

We answer by inquiring, if it were intended to assess the *property of the corporation* instead of the shares of stock, why should a deduction of the assessed value of the *real estate* be allowed? This provision as to deduction of real estate is an absolutely conclusive proof that the scheme is not one for the assessment of the *property of the corporation*. If the Auditor were fixing the value of *all* the corporation's property, why should he deduct a *portion* of that very property? and would a *deduction* of the value of a *part* of the property enable him to fix a value upon the *whole* of the *property?* The notion is an absurdity, and an incongruity.

After quoting Section 2764, which requires a full and correct list of the names and residences of the stockholders of a bank, and the number of shares held by each, to be kept in the office of the bank, and open during all business hours, to the inspection of taxing officials, plaintiff's counsel say, that these provisions are inserted in the statute because the United States Court has held that the States cannot tax the property of national banks, but can tax shares of stock in such banks. The fact is, as Section 2762 distinctly states, that the system of taxation, under consideration, relates to State banks and United States banks alike, and these requirements in Section 2764, respecting the names and residences of stockholders, and amounts of shares of stock held by them, all go to show that the system is one that has to do with *shares and shareholders*, rather than with the property of the bank itself.

After quoting Section 2765 plaintiff's counsel inquire, "What would be the object of returning 'the resources and "liabilities of the bank' if it were sought merely to determ-"ine the value of the shares of stock?" The object is that the Auditor may be furnished with data from which to form an intelligent estimate of the true value of the shares of stock.

After quoting Section 2766, which requires the Auditor to fix the total value of the shares of such banks, plain-

tiff's counsel say: "but under the constitutional provision he "must fix the value of the property of the bank itself." To this it may be answered that the value of the property of the corporation is always *one element*, and, indeed, the chief element, in determining the value of the shares of stock. To be sure, other considerations, such as good will, the franchise, the business ability and reputation of the managers of the bank, enter into the calculation. So that when the Auditor estimates the value of the shares of stock, he *necessarily includes* in that estimate the value of the property of the corporation, and the constitutional provision requiring the property of the corporation to be taxed is, to all practical intents and purposes, complied with. The value of the shares of stock cannot well be less than the value of the property of the corporation, but it may be, and usually is, far in excess of that value.

The property belonging to incorporated State banks (except real estate) is not taxed in Ohio, for the reason that taxation of the shares of stock in such corporations, necessarily includes, practically, the taxation of all property engaged in the banking enterprise. If, under Section 2746, *shares of stock* in a corporation are exempt when all the property of the corporation is taxed in Ohio, then *vice versa*, if all the shares of stock in a corporation are taxed in Ohio, the property of that corporation may, and should be, and is, exempt.

Counsel for plaintiff quote Sections 2758 and 2759, relating to unincorporated banks and bankers, and thus make it appear that that class of banks is taxed upon the property of the bank, and that in estimating the value of the property belonging to that class of banks, the value of non-taxable United States bonds is deducted, and from all that, draw the inference that the scheme of taxation is identical with the one found in Sections 2762 and 2769.

The argument is that unincorporated banks are taxed upon their property, therefore, shares of stock in incorporated banks are not made the subject of taxation. It is clear that the system of taxing *shares of stock* cannot possibly be applied to a bank which has no shares of stock. In the case of individual or partnership banks or bankers, there is no other system of taxing that can be adopted, except that of taxation of the property belonging to such banks and bankers, and, therefore, that system has been adopted.

It is equally obvious that when the legislature has to do with incorporated banks which have shares of stock owned by their shareholders, another system of taxation may be adopted which will, in practical effect, accomplish the taxation, not only of all the property belonging to the bank, but, also, such added value as the shares of stock may have over and above the value of the mere property of the corporation.

This last system is the one which the legislature has adopted for incorporated banks. Surely the incorporated banks cannot complain of the system, because, under it, their

corporate property (except real estate) escapes taxation entirely, in the name of the corporation, while the individual banker does not escape taxation unless his indebtedness exceeds his credits.

* * *

A supposed case is introduced by counsel for plaintiff, for the purpose of showing that if the legislation now under consideration be regarded as a system for taxing the shares of incorporated State banks, and not for taxing the property belonging to the banks themselves, the constitutional requirement of uniformity, as between unincorporated and incorporated banks, will be grossly violated.

The illustration, in its substance, is this: Suppose five men as partners, owning certain assets, among which are non-taxable U. S. bonds, engage in banking. When they are called upon to list their property for taxation, they may deduct their non-taxable United States bonds. But suppose they dissolve their co-partnership, and form a corporation under the State laws for banking, using precisely the same assets in carrying on their banking business as a corporation, plaintiff's counsel then inquire, "How, then, do they make "their return? They simply make their return by the cash- "ier of the bank to the Auditor. Will the Court say, because "they have become an incorporated, rather than an unincor- "porated institution, that by some mystic act of law they "shall then have their government bonds taxed, which were "not taxed when they were unincorporated bankers?"

This entire illustration is based upon a begging of the very question in issue in this case. It assumes that the Ohio plan of taxation for unincorporated State banks is exactly the same as the plan for incorporated State banks, and further assumes that that plan is the taxation of the property belonging to the banking institution, in the name of the banking institution. The truth is, that the plan of taxation for unincorporated and incorporated banks, is not the same. The real situation is this. If an unincorporated bank is the *owner* of non-taxable United States bonds, it is required to pay no tax on those bonds under the Ohio statutes. The very same thing is true if an incorporated bank *owns* the same class of bonds. Indeed, an incorporated bank not only does not pay any tax upon non-taxable United States bonds, but it pays no tax upon any of its property, whatever, except its real estate. There is, therefore, certainly no discrimination against incorporated State banks in respect to taxation of non-taxable United States bonds. The discrimination, if there be any, is rather in favor of the incorporated State bank, because not only are its United States bonds exempt from taxation, in the name of the corporation, but all of its other property, except real estate. Neither is there a discrimination as against the stockholders in incorporated State banks, in respect to the matter of exempting non-taxable United States bonds. The uniform rule is that United States bonds are not taxed in the hands of any one whatever, or whomever. In the case at bar, the United States bonds are

not *owned* by the share-holders, but are owned by the incorporation. The shareholders, therefore, not being the owners of those bonds, are not entitled to any exemption from taxation on account of such bonds. Why should one man's property (shares of stock though it be) be exempt from taxation, because some relative of his (even though it be an incorporated bank) owns some non-taxable bonds? All *owners* of United States bonds are treated exactly alike. All share-holders, whether in banks or in other corporations, are treated exactly alike in this respect. If any *stockholders own* non-taxable United States bonds, they will be exempt from taxation, even though the shares of stock themselves may be, and are taxed. To allow stockholders in banks to deduct the value of the United States bonds held by the bank, and not do the same thing for shareholders in other corporations owning United States bonds, would, indeed, be to violate the rule of uniformity.

* * *

Plaintiff's counsel affirm the following proposition: "A tax upon the shares of stock of a corporation in the hands "of the owner, is a tax upon a kind of property separate and "distinct from the property of the corporation itself, and "such a tax is not equivalent to a tax upon the property of "the corporation."

We are disposed to admit the truth of that proposition. The value of the property belonging to the corpora-

tion is not, necessarily, and, indeed, not generally identical with the aggregate value of its shares of stock. The aggregate value of the shares of stock cannot well be less than the value of the property belonging to the corporation, but may be, and very often is, very much greater. The aggregate value of the shares of stock is equal to the value of all the taxable tangible and intangible property of the corporation plus the value of all the corporation's non-taxable property, plus the value of the franchise, plus the value of its good will, and plus the value of the ability, energy and integrity of the managers of the incorporation. And just because the aggregate value of the shares of stock in a corporation *necessarily includes* the value of its property, and usually exceeds that value, the State taxes the *shares*, and, in that way, complies with the constitutional rule, that all property engaged in the banking business shall be taxed as other property, whether that value is derived, merely, from the value of the corporation's property, or whether it is derived from that source and the other elements of value above enumerated, which enter into the aggregate value of the shares of stock of the banking corporation.

This method of taxation, to-wit: taxation of shares of stock in incorporated State banks, certainly fulfills, to the very extreme limit, the requirement of the constitution, so strenuously insisted upon by the plaintiff's counsel, that all property engaged in the banking business must be taxed as other property.

Counsel for plaintiff inquire: "How can it be successfully maintained that there is equality if an unincorporated banker is allowed to deduct holdings in government bonds from his total capital, while the incorporated bank is not permitted to make such deduction in determining the value of its property?"

This question assumes that Ohio statutes tax the property belonging to incorporated banks in the name of the bank. Upon such an assumption the question has pertinency; but that assumption begs the very question in controversy. That assumed proposition is the very one which defendant in error denies.

On page 37 of their printed brief, plaintiff's counsel say, "The national bank tax decisions do not govern or control the question at issue in this case." Those decisions, however, and the law of Congress on which they rest, make it impossible for Ohio to tax shares of stock in national banks, if Ohio taxes the taxable corporate property of her State banks, and thus go far to show that Ohio does not lay a tax on the corporate property of her State banks, but on the shares of stock in those banks, which is the question in issue in this case. Indeed, those decisions hold, in effect, that if Ohio does not tax the shares in its State banks, but does tax only the taxable property belonging to those banks, then, such taxation is a discrimination in favor of State banks and against national banks, which will prevent Ohio from

taxing shares of stock in national banks *at all.* If the contention of the plaintiff in error in this case prevails, then, Ohio must cease taxing shares of stock in national banks; but in so recent a case as

Chapman vs. The National Bank of Wellington, 56 O. S., 310,

as well as in

Niles vs. Shaw, 50 O. S., 370,

the Supreme Court of Ohio held that shares of stock in national banks may be taxed in Ohio; and the Supreme Court of the United States, in

National Bank of Wellington vs. Chapman, 173 U. S., 205,

ratified this holding. Those decisions, therefore, are conclusive to the effect that Ohio does tax shares of stock in her State banks, and not merely the taxable property owned by those banks.

On page 34 of their printed brief plaintiff's counsel say: "The property of an Ohio corporation being subject to "tax, the shares of stock in such corporation in the hands of "the owner are exempted from taxation."

This proposition directs attention to that portion of Section 2746, R. S., which reads: "but no person shall be re- "quired to list for taxation any share or shares of the capital "stock of any company, the capital stock of which is taxed in "the name of such company."

The proposition quoted from the brief of plaintiff's counsel, assumes that the plaintiff in error is a corporation, "the capital stock of which is taxed in the name of such com-"pany." This again begs the question in controversy, for the defendant in error denies that the plaintiff in error is a corporation, "the capital stock of which is taxed in the name "of such company." None of the company's property is taxed in its name, except its real estate.

On page 37 of their brief plaintiff's counsel say, "this plaintiff in error made a return of its taxable prop-"erty."

The petition itself does not allege that the plaintiff in error is charged with the tax on the tax duplicate. In fact, plaintiff bank is not charged on the duplicate for anything but its real estate. The stockholders, and not the bank, are charged with the tax upon the duplicate, and the petition so avers.

Incorporated banks have no right to make their returns as individuals make their returns. When there are special provisions of a statute relating to a given subject, then general provisions of the statute upon that subject do not apply. Sections 2672 to 2679, R. S. of Ohio, both inclusive, relating to the taxation of shares in incorporated banks, are such special provisions upon the subject of returns made by incorporated banks, and hence the general provisions as to

returns made by individuals, or by other corporations, do not apply.

It should be remembered that Exchange Bank of Columbus, vs. Hines, 3 O. S., 1, from which plaintiff's counsel quote so very extensively, was decided in 1853, when Ohio did tax State banks on the basis of the property owned by the bank, and did not tax shares of stock in those banks. This renders those quotations, to a large extent, inapplicable to the case at bar.

*Respectfully submitted.*

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*Attorneys for Defendant in Error.*

CLEVELAND, OHIO, NOVEMBER 9, 1901.

W. W. Boynton.